Supreme Court U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAIER, Commissioner of Social Services of the State of Connecticut,

Appellant

V.

SUSAN ROE, et als

Appellees

On Appeal from the United States District Court for the District of Connecticut

APPELLEES' MOTION TO AFFIRM

Kathryn Emmett
1241 Main Street,
Bridgeport, Connecticut
06604

Catherine G. Roraback
265 Church Street
New Haven, Connecticut
06510

Ann Hill
33 Whitney Avenue
New Haven, Connecticut
06511

and

Lucy V. Katz
1241 Main Street
Bridgeport, Connecticut
06604

Marilyn P.A. Seichter
60 Washington Street
Hartford, Connecticut

Attorneys for Appellees

BEST COPY AVAILABLE

INDEX

Table of Citations	i
Motion to Affirm	1
Opinions Below	1
Statement of the Case	1-2
The Reasons Why the Motion Should Be Granted: Connecticut's Medicaid Regulations Unconstitutionally Infringe Upon Appellees' Constitutional Right to Have an Abortion and No Sufficient State Interest Has Been Advanced to Justify the Infringement.	3-5

TABLE OF CITATIONS

Doe v. Bolton, 410 U.S. 179 (1973)	5
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	4
Roe v. Wade, 410 U.S. 113 (1973)	3,5
Shapiro v. Thompson, 394 U.S. 618 (1969)	3

THE MOTION TO AFFIRM

The appellees move to affirm the judgment of the United States District Court for the District of Connecticut entered herein on January 16, 1976, which is set out at length in Appendix B, pages 26 et seq, of the Appellant's Jurisdictional Statement, which judgment declared unconstitutional certain requirements of Volume 3, Chapter III, Section 275 of the Connecticut Welfare Public Assistance Manual (1) relative to the performance of abortions and reimbursement by Medicaid of the expenses therefor and ordered appellant to give notice to persons eligible for Medicaid assistance that abortion is a physician's service eligible for Medicaid reimbursement.

OPINIONS BELOW

The opinions below are set out at pages 1 - 2 of Appellant's Jurisdictional statement.

The memorandum of decision and the judgment to which this motion is addressed appear respectively as Appendix A at pages 18 et seq and Appendix B at pages 26 et seq of Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought by several women who having become pregnant and decided in consultation with their physicians to terminate their

---

(1) During the pendency of this action there was a reorganization of the Connecticut agencies involved in this litigation. The identical regulations are now to be found in the Department of Social Services Manual and are those set out at length in Appendix D, pages 30 et seq, Appellant's Jurisdictional Statement.

pregnancies by abortion during the first trimester of pregnancy were denied reimbursement for the costs of this medical procedure by the State of Connecticut even though they were entitled to receive medical benefits as recipients of public assistance. The basis of the denial of the benefits was the failure and refusal of their doctors to seek prior approval of the operation, to certify as to the medical necessity of the operation or to furnish certification that the patient requested its performance, all as required by the regulations of the department.

A single judge acting for the United States District Court for the District of Connecticut found the constitutional claim to be substantial and held as to the statutory claims that Title XIX (Medicaid) of the federal Social Security Act, 42 U.S.C. 1396 et seq, neither required nor prohibited payment for elective abortion. 380 F. Supp. 726 (D.Conn., 1974).

On appeal by the State, the United States Court of Appeals for the Second Circuit held that the Act was neutral as to abortion payments, that the State of Connecticut was not required by it to follow the policy as to reimbursement for abortions adopted by it, and remanded to the District Court for the consideration by a three judge court of the constitutional questions raised in the event the state chose to continue its policy. 522 F. 2d 934 (C.A.2,1975).

The State of Connecticut then adopted the regulations set out in Appendix D, pages 30 et seq of Appellant's Jurisdictional Statement, in essence continuing its prior policy.

Appellees moved that a three judge court be convened and filed a motion for summary judgment which was after hearing granted, the court holding that the regulations' requirements for a certificate of medical necessity and for prior approval of the performance of an abortion were unconstitutional. (Appendix A, pages 18 et seq, Appellant's Jurisdictional Statement.)

Appellees here move the Court to affirm that decision.

THE REASONS WHY THE MOTION SHOULD BE GRANTED

This Court in 1973 proclaimed that a woman has, as a part of her right to privacy, the right to decide whether to terminate a pregnancy by abortion and that that decision during the first trimester of pregnancy is a medical one to be reached by a physician in consultation with his or her patient "free of interference by the State." Roe v. Wade, 410 U.S. 113,163 (1973).

There are of course women such as these appellees who do not themselves have the funds to enable them to exercise that right - who as recipients of public assistance look to governmental agencies for the costs of the medical care necessary to the performance of the abortion.

The appellant in his jurisdictional statement argues at length that the appellees do not have a right to such assistance, but that is not the issue here. Connecticut already does provide public assistance; as a part of that public assistance it provides medical assistance through its 'medicaid' program; as part of that medicaid program it provides medical assistance for pre and post-natal care; and as part of that medicaid program it provides medical assistance for therapeutic abortions.

Although it need not have a program of public assistance, once it does have such a program it cannot condition the receipt of benefits thereunder upon a requirement of residency since such a requirement would infringe upon a fundamental constitutional right, the right of freedom of movement and freedom of travel. Shapiro v. Thompson, 394 U.S. 618 (1969). So too if public

emergency medical care is provided, its provision cannot be limited by a residential requirement since that would infringe on the freedom of movement. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

As the Court below found:

> "...once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion."
>
> Appendix A, page 20, Appellant's Jurisdictional Statement.

It went on to point out that the state, by making funds available only for therapeutic abortions and for pre and post-natal care, weights the choice of the pregnant woman who is dependent on public assistance against her free exercise of her constitutional right.

No sufficient state interest has been asserted by the appellant to justify the infringement of the exercise by the appellees of their rights. In his jurisdictional statement, as in the court below, appellant relies on his claim that Connecticut cannot afford to pay for non-therapeutic abortions. As was said by this Court in Memorial Hospital v. Maricopa County, supra, "conservation of the taxpayer's purse" is not sufficient to satisfy the standard which must be satisfied where fundamental rights are concerned. Even were that not the case, the alternative to the cost of the abortion is a risk of far greater expense for the carrying through to term of the pregnancy and the delivery of a child who would in all probability require public assistance for years. See Footnote 4, Decision Below, Appendix A, page 25, Appellant's Jurisdictional Statement.

Nor has the state advanced any sufficient interest to justify its requirement for prior approval of the performance of an abortion as a condition for reimbursement of the costs.

This Court clearly held in Roe v. Wade, supra, that in the first trimester of pregnancy, the abortion decision is to be left wholly with the attending physician and the patient, and in a companion case nullified review procedures of the abortion decision in a Georgia statute, saying:

> " The woman's right to receive medical care in accordance with the licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed review."
>
> Doe v. Bolton, 410 U.S.179,198

Appellant in his jurisdictional statement merely raises factual questions as to whether the prior approval requirement in fact need delay the performance of the abortion. Nowhere does he provide any justification for the procedure. Absent a compelling state interest the prior approval requirement was properly held below to be an unconstitutional infringement on appellees' constitutional rights.

We urge the Court therefore to affirm the judgment below.

THE APPELLEES

By Catherine G. Roraback

Catherine G. Roraback

Kathryn Emmett

Ann Hill

Lucy V. Katz

Marilyn P. A. Seichter

Their Attorneys

BEST COPY AVAILABLE